

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1231 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF PRAMODCHANDRA R MODI

Versus

BAI CHAMPA WD/O.AMBALAL G MODI

Appearance:

1. First Appeal No. 1231 of 1985
MR GIRISH D BHATT for Appellants
MR RN SHAH for Respondents
-

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 10/01/2002

ORAL JUDGEMENT

When this matter is called out, learned advocates

appearing for the parties jointly submitted that respondent No. 1 has died leaving behind her three heirs and legal representatives who are already impleaded as respondent Nos. 2, 3 & 4, therefore, respondent Nos. 2, 3 & 4 may be permitted to defend this appeal in the capacity of heirs and legal representatives of the deceased respondent No.1 that is Bai Champa widow of Ambalal Girdharlal Modi and in their individual capacity.

2. Since in view of joint submission made by learned advocates appearing for the parties respondent Nos. 2, 3 & 4 are allowed to defend this appeal in the capacity of heirs and legal representatives of deceased Bai Champa widow of Ambalal Girdharlal Modi and in their individual capacity, appellants are directed to amend the cause-title accordingly by making necessary endorsement in the memo of appeal.

3. In this appeal filed under Section 96 of the Code of Civil Procedure ('The Code' for short), appellants have brought under challenge the judgement and decree dated October 11, 1984 passed in Civil Suit No. 411 of 1980 by the learned Judge, Court No.7, City Civil Court, Ahmedabad, whereby, learned Judge was pleased to pass a decree as prayed for in favour of the respondents for declaration and permanent injunction restraining the defendants from obstructing the respondents in causing to construct one water-closet on the suit land in such manner as would not obstruct the enjoyment thereof by the other co-owners or the persons claiming through such other co-owners subject to any other orders that may be passed in Civil Application No. 1404 of 1979 or the decision in First Appeal No. 699 of 1979.

4. Appellants are the original defendants and respondents are the original plaintiffs and for the sake of convenience and brevity, parties will be referred to as 'plaintiffs' and 'defendants' hereinafter in this judgement.

5. The facts of the plaintiffs' case in nutshell can be narrated as follows :-

5.1 It is the case of the plaintiffs as pleaded in the plaint that plaintiffs and the defendants are co-owners of the suit land. The defendants have unauthorisedly constructed one water-closet and one chokdi in the suit land. The plaintiffs had filed Civil Suit No. 2230 of 1974 for demolition of the said water-closet and the chokdi, in the City Civil Court, Ahmedabad. The said Civil Suit was decided by the City

Civil Court vide judgement and decree dated March 20, 1979. Aggrieved thereby, plaintiffs had preferred First Appeal No. 699 of 1979 before this Court. In the said appeal plaintiffs had also filed Civil Application No. 1404 of 1979 wherein the defendants had contended that the suit land to be of joint ownership of the plaintiffs and the defendants. The plaintiffs had no latrine in their property bearing City Survey No. 1995. They also needed one chokadi for their water requirement. They had also received one notice dated June 27, 1979 from the Municipal Corporation of Ahmedabad requiring them to construct a water-closet on their property. The Municipal Corporation had informed them that if the plaintiffs do not construct the water-closet in terms of the aforesaid, they would be liable to prosecution as provided under the Bombay Provincial Municipal Corporation Act, 1949 ('The Act' for short). The defendants are likely to obstruct the plaintiffs by raising such water-closet and constructing such chokadi in the suit land. The plaintiffs therefore filed the present suit for the relief of permanent injunction and mandatory injunction. Defendant No.4 contested the suit by filing written statement exhibit-15 in the Notice of Motion proceeding. Remaining defendants adopted the reply filed by defendant No.4 at exhibit-15 wherein it is contended that the suit is not maintainable, it is barred by provisions contained in order II Rule 2 of the Code, barred by principles of resjudicata, bad on account of delay, laches and acquiescence on the part of the plaintiffs. The defendants also denied the plaintiffs' case of joint ownership of the suit land. It was claimed by them that they became owner by adverse possession in respect of the suit land and, therefore, it was prayed for dismissal of the suit and compensatory cost from the plaintiffs.

6. The Trial Court formulated issues at exhibit-23 in light of pleadings of the parties. Viva-voce and the mandatory evidence was also considered and on appreciation and evaluation of the evidence, came to the conclusion that the suit land is of the joint ownership of the plaintiffs and the defendants and defendants have become owners of the suit land by adverse possession and resultantly, allowed the suit and passed a decree as prayed for, to which reference is made in earlier paragraph of this judgement, which has given rise to the present appeal at the instance of the defendants.

7. Mr. G.D.Bhatt, learned advocate for the appellants contended that the Trial Court has misread the evidence on record and, therefore, came to the erroneous

conclusion that the plaintiffs and the defendants are the joint owners of the suit property. It is emphasized by the learned advocate that the Trial Court has recorded erroneous finding that the co-owners of the suit land are entitled to the reasonable user thereof and, therefore, putting the construction of water-closet on suit land as proposed by the plaintiffs amounted to reasonable user thereof. It is emphasized by the learned advocate that though there is ample evidence on record that the defendants have become owner by the adverse possession the learned Trial Judge has failed to record the said findings. On the aforesaid premises, learned advocate stressed that on the basis of the erroneous findings, learned Trial Judge has recorded decree in favour of the plaintiffs which is liable to be quashed and set aside by allowing this appeal. He, therefore, prayed to allow this appeal and thereby to dismiss the suit filed by the plaintiffs.

8. Mr. R.N.Shah, learned advocate for the respondents with all his vehemence at his command tried to justify the impugned judgement and decree recorded by the learned Trial Judge. According to him, there is no infirmity or illegality committed by the learned Trial Judge in recording the impugned judgement and decree by holding that the plaintiffs and defendants are the joint owners of the property and, therefore, plaintiffs are entitled to decree as prayed for, that is, the declaration and permanent injunction against the defendants. What is emphasized by the learned advocate is that there is ample evidence on record to show that the defendants have never become owners by adverse possession. On the contrary, there is clinching evidence with respect to joint ownership of the disputed suit land between the plaintiffs and the defendants. On the aforesaid submissions, Mr. Shah urged that there is no merit in this appeal which is liable to be dismissed and accordingly same may be dismissed.

9. I have considered the submissions advanced by the learned advocates appearing for the parties. I have perused the impugned judgement and decree and the oral as well as documentary evidence produced before the Trial Court.

10. At the outset, be it stated that on behalf of plaintiffs, plaintiff No.2 is examined at exhibit-26 whereas on behalf of the defendants two witnesses have been examined; one is defendant No.1 himself at exhibit-40 and second one is Sivabhai Bhikhabhai Rami at exhibit-50. Both the parties have also brought on record

documentary evidence. Defendant No.1 in his oral testimony admitted that in Civil Suit No. 2230 of 1974 evidence was given by defendant No.5 on behalf of defendants wherein, it was admitted that suit land was of the joint ownership of the parties. A copy of the judgement in the said Civil Suit No. 2230 of 1974 is also produced at exhibit-24. In para 11 of the said judgement, the learned Trial Court has in terms held that the suit land is of the joint ownership of the plaintiffs and the defendants. Defendant No.1 has further admitted that they have preferred appeal against the judgement and decree passed in Civil Suit No. 2230 of 1974. That finding has thus become final between the parties and on the basis of the aforesaid evidence, learned Trial Judge has come to the conclusion that the suit land is of joint ownership of the plaintiffs and the defendants.

11. On reassessment and reevaluation of the aforesaid evidence, I am in total agreement with the reasoning adopted by the learned Trial Judge and finding reached by him that the suit land is of the joint ownership of the plaintiffs and the defendants.

12. The plaintiffs had tried to establish that they have become owner by adverse possession of the suit land. This contention of the defendant cannot be accepted in view of the fact that in proceedings of earlier Civil Suit No. 2230 of 1974, defendants had admitted that the suit land is of joint ownership of the parties. Therefore, I do not find any force in this contention.

13. In the aforesaid evidence and state of affairs, I am of the opinion that the defendants are not justified in raising any objection against the construction of the water-closet on the suit land by the plaintiffs for their use, pursuant to the notices. In view of the discussions made hereinabove, I am fully satisfied that the learned Trial Judge has considered the evidence in its true spirit and has considered the judgement and decree recorded in previous suit bearing No. 2230 of 1974 and came to the just and correct conclusion on the facts and circumstances of the case. I find myself in complete agreement with the reasonings adopted by the learned Trial Judge and the finding reached by him.

14. In the aforesaid premises, there is no alternative for this Court but to confirm the judgement and decree passed by the learned Trial Judge by dismissing the appeal as appeal is proved to be an exercise in futility.

15. Before parting, be it noted that so far as previous suit bearing Civil Suit No. 2230 of 1974, filed by the plaintiffs is concerned, it came to be dismissed with the observation that the parties are the joint owners of the suit property. The said judgement and decree was challenged before this Court by filing First Appeal No. 699 of 1979 by the plaintiffs which came to be dismissed by this Court vide order dated April 6, 2000 as it became infructuous, . In the said judgement, while dismissing the appeal, this Court had observed that the Civil Application No. 2390 of 1984 was allowed so that the decree dated October 11, 1984 recorded in Civil Suit No. 411 of 1980, that is the decree which is impugned in this appeal may operate. The rider to issue injunction only after disposal of First Appeal No. 699 of 1979 by this Court is now removed and therefore, now the plaintiffs are entitled to injunction as recorded in the operative portion of the order and judgement which is impugned in this appeal.

16. For the foregoing reasons, the appeal fails and is accordingly dismissed with no order as to cost.

(A.M.Kapadia, J)
Jayanti*